No. 94-1482

# In the Supreme Court of the United States

OCTOBER TERM, 1994

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LEROY CLOUSER, ET AL., PETITIONERS

*v.*

DAN GLICKMAN, SECRETARY OF AGRICULTURE, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioners have a due process right to a formal, oral evidentiary hearing before the Forest Service determines the mode of transportation that petitioners may use to cross federal lands, designated as wilderness areas pursuant to 16 U.S.C. 1131(a), to gain access to their unpatented mining claims.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A81) is reported at 42 F.3d 1522. The decision of the district court (Pet. App. B1-B25) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on December 7, 1994. The petition for a writ of certiorari was filed on March 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. This case involves petitioners' asserted rights to use motor vehicles to gain access to two sets

of mining claims on federal lands that have been designated as wilderness areas under the Wilderness Act of 1964, 16 U.S.C. 1131(a).[1] The Forest Service, an agency within the Department of Agriculture, concluded that petitioners may use only non-motorized means such as pack animals to reach their claims. Petitioners assert that they have a statutorily conferred property right of access to their claims, and that the Forest Service's imposition of the motor vehicle restriction based on evidentiary submissions, briefing, and informal oral conferences—but without a formal, oral evidentiary hearing—violated their procedural due process rights. Pet. i; Pet. App. A3.

The National Forest wilderness areas on which petitioners' claims are situated were in the past open to the public for the location and extraction of minerals, but those lands have since been withdrawn from mineral entry under the Wilderness Act. Only persons who discovered valuable mineral deposits on those lands before they were withdrawn have valid claims to mine there. Pet. App. A4-A5. The Bureau of Land Management in the Department of the Interior administers the laws governing the staking of mining claims on federal lands, and determines the validity of

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[1] The petition identifies a third claim—the Wilson placer mining claim (Pet. 11-15)—that is not in a designated wilderness area, but lies on National Forest land that is part of the National Wild and Scenic Rivers System, 16 U.S.C. 1271. The court of appeals held that the Wilson claimants failed to exhaust their administrative remedies. Pet. App. A36-A45. Petitioners do not challenge that holding, nor do they assert that the exhaustion requirement itself violates due process or is otherwise invalid. See Pet i. There is thus no issue properly before this Court regarding the restrictions on motorized access to the Wilson placer mining claim.

claims such as petitioners'. *Id.* at A6. All of petitioners' mining claims are unpatented, which means that petitioners do not hold fee simple interests, but have only limited possessory interests in the land solely for the purpose of mining, as authorized by federal statute. *Id.* at A5 n.2.

The Wilderness Act requires the Department of Agriculture to grant access to valid mining claims within wilderness areas, and authorizes the Department to regulate such access. 16 U.S.C. 1134(b). Section 1134(b) provides that "where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area," the Secretary of Agriculture shall, "by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated." *Ibid.* Pursuant to that provision, the Secretary, acting through the Forest Service, has promulgated regulations authorizing motorized access only "where essential," 36 C.F.R. 228.15(b),[2] and by means "cus-

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[2] Section 228.15(b) provides in relevant part:

> Operations shall be conducted so as to protect National Forest surface resources in accordance with the general purposes of maintaining the National Wilderness Preservation System unimpaired for future use and enjoyment as wilderness and to preserve its wilderness character, consistent with the use of the land for mineral location, exploration, development, drilling, and production and for transmission lines, water lines, telephone lines, and processing operations, including, where essential, the use of mechanized transport, aircraft or motorized equipment.

tomarily used" to access similar claims, 36 C.F.R. 228.15(c).[3]

Under Forest Service regulations, persons proposing to engage in mining operations that "might cause disturbance of surface resources" in National Forest areas must file a "notice of intention to operate." 36 C.F.R. 228.4(a). If the District Ranger determines that the proposed operations "will likely cause significant disturbance of surface resources," the operator must "submit a proposed plan of operations." *Ibid.* The District Ranger may, before approving the proposed plan, identify changes necessary to bring it into conformity with the purpose of the regulations. 36 C.F.R. 228.5(a). "[T]o the extent practicable," Forest Service officers "consult and meet in person, or by phone, with holders of written instruments" (such as mining plans of operation, see 36 C.F.R. 251.82(a)(4)) before deciding whether and to what extent to authorize implementation of such plans. 36 C.F.R. 251.93(a). "The purpose of such meetings is to discuss any issues or concerns related to the authorized use [*e.g.*, mining operations] and to reach a common understanding and agreement where possible prior to issuance of a written decision." *Ibid.*

Any person proposing to conduct mining operations who is aggrieved by a decision regarding a proposed

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[3] Section 228.15(c) provides in relevant part:

> Persons with valid mining claims wholly within National Forest Wilderness shall be permitted access to such surrounded claims by means consistent with the preservation of National Forest Wilderness which have been or are being customarily used with respect to other such claims surrounded by National Forest Wilderness.

plan of operations may take an administrative appeal. 36 C.F.R. 228.14; 36 C.F.R. Pt. 251, Subpt. C. The appellant must submit the grounds for the appeal in writing. See 36 C.F.R. 251.90. Briefs and documentary evidence, including witness declarations or transcripts, may be submitted, see Pet. App. A78, and such documents become part of the administrative record, 36 C.F.R. 251.98. An opportunity for an informal "oral presentation" is also available upon request at the appeal stage. 36 C.F.R. 251.97. The purpose of an oral presentation is to ensure that the parties have an opportunity orally "to present their viewpoints to the Reviewing Officer" and "to restate, emphasize, and/or clarify information related to an appeal." *Ibid.*

2. a. Petitioners Leroy and Sharon Clouser own the first of the two sets of mining claims at issue here, referred to as the Robert E. claims. Pet. App. A7. Those claims are located on land that was included in the Siskiyou Forest Reserve on October 5, 1906, and that was withdrawn from mineral entry when it became part of the Kalmiopsis Wilderness Area on September 3, 1964. *Id.* at A8. In 1985, the Forest Service initiated proceedings before the Department of the Interior to challenge the validity of the claims on the ground that no valuable mineral deposits had been identified before 1964, when the lands were withdrawn. *Id.* at A8-A9. An Administrative Law Judge within the Department of the Interior preliminarily held those claims invalid, *id.* at A9, and petitioners' administrative appeal of that decision is pending before the Interior Board of Land Appeals.

Meanwhile, in 1990, the Clousers filed a plan of mining operations for the Robert E. claims. Pet. App.

A9. The District Ranger approved the Clousers' plan, except that he did not approve the proposal for motorized access to the claims during the period while the Department of the Interior was reviewing the claims' validity. *Id.* at A9, A46. The Clousers appealed the modified plan of operations to the Regional Forester, who affirmed it. *Id.* at A10.

b. Petitioners Carl, Judith, and Anthony Setera own the second set of mining claims at issue here, known as the Thunderbolt claims. Pet. App. A10. Those claims are on land that was included in the Blue Mountain Forest Reserve on March 15, 1906, and that was withdrawn from mineral entry when it became part of the North Fork John Day Wilderness Area on June 26, 1984. *Ibid.* Only one of those claims —Thunderbolt Claim No. 2—is at issue here, and the government has assumed, for purposes of this litigation only, that that claim is valid. *Ibid.*

In 1988, the Seteras filed a notice of intent and plan of operations proposing to use a suction dredge[4] on Thunderbolt Claim No. 2. The plan also proposed to gain access to the claim by clearing and expanding two trails that the Forest Service had closed in 1984, and by driving motorized vehicles over them. Pet. App. A10-A11, A61. The Forest Supervisor approved the plan, but disapproved the proposed motorized access on the ground that such access was not essential given the limited nature of the proposed mining. *Id.* at A11. The Seteras submitted a revised proposed plan of operations in 1989, proposing to use a

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[4] A suction dredge is like a large vacuum cleaner that draws gravel up from the bed of the river and allows the miners to pass the water and gravel through a crusher and then separate the heavy minerals from the slurry.

five-inch suction dredge and to gain motorized access over the same two trails. *Id.* at A11-A12. The Forest Supervisor again disapproved the use of motorized access, given the limited nature of the proposed operations and the Forest Service's mandate to limit motorized uses in wilderness areas. *Id.* at A12. In this regard, Forest Service personnel had carried a similar suction dredge to the site by pack horse when they examined the claim to assess its validity. *Id.* at A60; see also C.A. Supp. Excerpts of Record (E.R.) 34.

The District Ranger had repeated oral communications with the Seteras and their attorney in an effort to resolve the dispute regarding motorized access. C.A. E.R. 81. The Seteras themselves noted that the District Ranger's office had expressed an interest in "further face to face discussions," but the Seteras felt that no further oral communication was needed because they believed that their plan "as presented in the District Office administrative record for the Thunderbolt No. 2 claim, is simple, self explanatory, and readily understood." *Ibid.* Accordingly, in their notice of administrative appeal, the Seteras did not request an opportunity to make an oral presentation. See *id.* at 75-82. On appeal, the Forest Service affirmed the decisions on both the original and revised plans of operations. Pet. App. A12-A13.

3. Petitioners jointly filed suit against officials of the Department of Agriculture and the Department of the Interior seeking declaratory and injunctive relief to permit them motorized access to their mining claims. Pet. App. A17-A18. The parties filed cross-motions for summary judgment. The district court referred the case to a magistrate judge, who recommended that the court grant summary judgment

in the government's favor. *Id.* at C1-C52. The district court reviewed the parties' objections to the magistrate judge's recommendation and, with minor modifications, adopted it. *Id.* at B1-B25.

4. The court of appeals affirmed. Pet. App. A1-A83. The court of appeals held that the Forest Service had authority under the Wilderness Act to regulate access to petitioners' mining claims, *id.* at A19-A26, and that it had lawfully denied motorized access to the Robert E. and Thunderbolt claims, *id.* at A46-A71. Denial of motorized access to the Robert E. claims was proper, the court held, because the Department of the Interior had preliminarily found those claims invalid, and the Forest Service has an authorized policy of refusing to approve motorized access to mining claims in wilderness lands unless they have been found to be valid. *Id.* at A47-A58. The court also concluded that the proposed motorized access to the Thunderbolt claim would contravene Forest Service regulations. The Forest Service had concluded that motorized access was not essential for the operators on the claims, and that, for the type of operations proposed, motorized access was not "customarily used" within the meaning of 36 C.F.R. 228.15(c). Pet. App. A58-A59.

The court of appeals further held that even if the trails were, as petitioners contended, public rights-of-way that petitioners could use without Forest Service approval pursuant to 36 C.F.R. 228.4(a) (exempting proposed use of public roads from plan-of-operation requirements), petitioners' proposal to clear and broaden the trails required Forest Service approval. Pet. App. A66-A67. The court held that the Forest Service properly denied such approval on the ground that the use of motorized transport was not

"essential" under 36 C.F.R. 228.15(b) because of the relatively small scope of the proposed mining operations and the consequently limited volume of material and equipment that would need to be transported. Pet. App. A59-A60, A64-A65.

The court of appeals rejected petitioners' contention that the Forest Service violated their procedural due process rights by making the challenged determinations about motorized access without first holding formal evidentiary hearings. Pet. App. A75-A80. The court found it unnecessary to decide whether petitioners have statutorily conferred property rights in their claims under 16 U.S.C. 1134(a) (which assures adequate access to privately owned lands surrounded by National Forest lands), because the procedural protections provided by the Forest Service satisfied constitutional due process requirements in any event. Pet. App. A77-A78.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

There is no merit to petitioners' contention (Pet. i, 39-64) that the Due Process Clause requires a formal, oral evidentiary hearing before the Forest Service may regulate petitioners' mode of access to their mining claims over federally protected wilderness lands.[5] Petitioners cite no authority establishing

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[5] Much of the petition (Pet. 15-40) is devoted to other contentions that not only lack merit, but also are (1) waived because they were not made in the cour s below (*e.g.*, Pet. 22 (asserting that respondents failed to develop federal land use management plans)), (2) not encompassed within the ques-

that the Forest Service's procedures are inadequate. It is well established that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). The nature of the procedures required depends on a balancing of the governmental and private interests involved. Under *Mathews*,

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335; see, *e.g.*, *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 501 (1993). Under that analysis, the procedures the Forest Service afforded to petitioners were fully adequate to protect petitioners' interests in access to their mining claims.

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tions presented (*e.g.*, Pet. 21 (appearing to raise equal protection challenge based on difference between Bureau of Land Management procedures and Forest Service procedures)), and/or (3) based on misstatements of the holding of the court of appeals (*e.g.*, Pet. 26 (asserting that court held that petitioners lacked constitutionally protected property rights)). We accordingly do not address those contentions.

First, petitioners' private interest in motorized access to their claims is not weighty. They have yet to establish the validity of the Robert E. claims. Because petitioners have not yet established the validity of those claims, the restrictions on the mode of access to the claims does not deprive petitioners of any valuable benefit. On the Thunderbolt claim, petitioners are free to carry out their proposed mining operations with the use of pack animals or other non-motorized means of transport. The magistrate judge correctly concluded that petitioners "have not challenged [respondents'] position that the modest production from the [Thunderbolt] claim does not justify motorized access." Pet. App. C51.[6]

Second, the procedures that the Forest Service used in this case to modify and approve petitioners' plans of operation did not create any serious risk of erroneous deprivation of petitioners' interests. "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 894 (1961). Forest Service regulations allow for the submission of evidence and afford informal opportunities to make oral presentations to Forest Service decisionmakers. The parties in this case engaged in an adversary administrative factfinding process, in which the Forest Service accepted all the evidence

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[6] Contrary to petitioners' contention (Pet. 62-63), the difference in the nature of the determination here, where the Forest Service is regulating only the mode of access to mining claims, as compared to a decision by the Department of the Interior concerning the underlying validity of mining claims themselves, justifies the less formal procedures applicable here.

petitioners proffered and made explicit findings in support of its decisions.[7]

Petitioners have failed to identify any evidence that they were unable to submit in the administrative process. They contend (Pet. 47, 59) that the agency erred in rejecting the conclusions in their "critical geologist report" that motorized access was needed (Pet. App. E46-E47), and in not explaining why it did so. Yet, as petitioners themselves acknowledge, the Forest Service did give reasons for concluding that motorized access was not essential, including "that the scope of the proposed operation [at Thunderbolt No. 2] was relatively small, needing only a five inch suction dredge" (see Pet. 48), which the Forest Service had demonstrated could be carried to the site by pack animal. Pet. App. A60. That issue did not turn on credibility, nor was it in any other way inappropriate for disposition on a written record.[8]

Although there was no formal oral hearing, "[t]here is no inexorable requirement that oral testimony

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[7] Pet. App. A79; see C.A. E.R. 62-63, 73-74, 95-98 (decisions on Thunderbolt claim); C.A. Supp. E.R. 58-61 (decision on Robert E. claims).

[8] Petitioners also contend (Pet. 50-52) that the risk of error is illustrated by a need to take lay testimony and make credibility determinations regarding the customary use of the access routes to their mining claims. The court of appeals, however, did not rely on the Forest Service's conclusion that the routes petitioners proposed were not public highways; rather, it assumed that they were public roads that previously had been open to motor vehicles, and instead relied on and sustained the Forest Service's independent rationale that petitioners' plan would involve clearing and upgrading those routes so that petitioners' trucks could drive on them. Pet. App. A62, A66-A67. See 36 C.F.R. 228.12.

must be heard in every administrative proceeding in which it is tendered," *FDIC* v. *Mallen*, 486 U.S. 230, 247-248 (1988), and, in any event, no tendered oral testimony was rejected in this case. Indeed, the Seteras repeatedly communicated orally with Forest Service officials regarding their claims for motorized access, and they concluded before they took their administrative appeal that they were satisfied to present their claims on the written administrative record and that no further oral communication was necessary. Petitioners did not elect to take advantage of the opportunities for oral presentation available to them on their administrative appeals. 36 C.F.R. 251.97. In sum, petitioners have failed to show that the procedures the Forest Service afforded them created a risk of erroneous deprivation of whatever property interest they might have in access to their mining claims.

Finally, the Department of Agriculture's decision not to require the Forest Service to conduct formal evidentiary hearings before regulating motorized access to petitioners' mining claims is consistent with the public interest. "The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." *Mathews*, 424 U.S. at 348. Rather, all that is required is that the procedures be appropriate to the nature of the decision to be made, and the capacities and circumstances of the claimants. *Id.* at 349 (quoting *Goldberg* v. *Kelly*, 397 U.S. 254, 268-269 (1970)). Judicial-type evidentiary hearings are time-consuming, costly, and often cumbersome. They are not required for, nor are they appropriate to, every governmental decision potentially affecting property interests. Although we believe that no property

rights were infringed by the challenged Forest Service decisions, the procedures by which those decisions were made in this case afforded petitioners more than adequate protection for any property rights that may have been affected.[9]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1995

[9] Petitioners also have an adequate post-deprivation remedy in the form of an action for just compensation in the Court of Federal Claims for any taking of property rights that may have occurred in the wilderness areas.

See 28 U.S.C. 1491(a)(1) (Supp. V 1993); Pet. App. A71-A75.